

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

No. CR01-0393BJR

V.

ORDER ON LIMITED REMAND

## JOSEPH E. IRVING

Defendant.

This matter comes before the court as a result of a limited remand of the Ninth Circuit Court of Appeals pursuant to United States v. Ameline, 409 F.3d 1073 (9th Cir. 2005) (*en banc*). In accord with the limited remand procedures adopted in United States v. Ameline, each party was invited to file a supplemental pleadings.

In the supplemental pleadings, the parties were asked to advance sentencing arguments previously barred or deemed "not ordinarily relevant" under pre-Booker guideline analysis. See United States v. Booker, 125 S. Ct. 738 (2005). Counsel were reminded that the question at this stage is not whether the defendant *should have* received a different sentence. Rather, the

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1 issue before the court is whether, under an advisory guidelines  
2 regime, the defendant *would have* received a different sentence, and  
3 whether that difference would have been *material*. The Court has  
4 received and reviewed a memorandum from the government. Defendant  
5 did not file any supplemental pleadings.

6 Between 1996 and 2001, Mr. Irving engaged in fraudulent  
7 schemes in which he used fictitious and/or stolen identities to  
8 commit between \$70,000 and \$120,000 of fraud. On November 6, 2001,  
9 defendant pled guilty to Bank Fraud, in violation of 18 U.S.C. §  
10 1344. The United States Probation Office prepared a Presentence  
11 Report calculating defendant's Total Offense Level at 15,  
12 indicating that his Criminal History Category was VI, and that his  
13 sentencing range was 41 to 51 months. Due to defendant's  
14 cooperation, the government recommended a sentence at the low end  
15 of the relevant sentencing range under the Sentencing Guidelines.

16 On May 1, 2002, the court adopted this recommendation, and  
17 sentenced defendant to 41 months' imprisonment to be followed by  
18 five years' supervised release. Defendant has completed the  
19 confinement portion of his sentence, and began his term of  
20 supervised release on June 4, 2004.

21 The government contends in its memorandum that defendant lacks  
22 standing to challenge his 41-month term of imprisonment, because he  
23 has already completed that portion of his sentence. Moreover, the  
24 government argues that given the seriousness of the offense, the  
25 court would not have imposed a materially lower prison sentence or  
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1 term of supervised release had it been aware that the Sentencing  
2 Guidelines were merely advisory.

3       Indeed, the court would not have imposed a materially lower  
4 sentence had it perceived the guidelines as advisory at the time of  
5 sentencing.<sup>1</sup> This defendant had a 20-year history of criminal  
6 behavior, including nine felony convictions and multiple  
7 misdemeanor convictions. As the government points out, he had  
8 double the points necessary to place him in the highest Criminal  
9 History Category. Defendant's sentence reflects the court's opinion  
10 that he is precisely the sort of defendant for whom substantial  
11 terms of imprisonment and supervised release are warranted.  
12 Defendant has presented the court with no arguments to the  
13 contrary.

14       The court concludes that under an advisory guidelines regime,  
15 defendant's sentence would not have been materially different. For  
16 this reason, IT IS HEREBY ORDERED that defendant's request for  
17 resentencing is DENIED.

18       DATED this 14<sup>th</sup> day of February, 2006.

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21

22       Barbara Jacobs Rothstein  
U.S. District Court Judge

23  
24       <sup>1</sup> It is unnecessary for the court to reach the government's  
25 argument that a defendant who has completed the confinement portion  
26 of his or her sentence lacks standing to challenge a term of  
imprisonment under Ameline.

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